83-241

No. _____

IN THE

Supreme Court of the United States

October Term, 1983

OLSON MOTOR COMPANY, a Minnesota Corporation and RAY A. OLSON,

Petitioners,

vs.

GENERAL MOTORS CORPORATION, a Delaware Corporation and GENERAL MOTORS ACCEPTANCE CORPORATION, a New York Corporation,

Respondents.

REPLY OF RESPONDENT GENERAL MOTORS ACCEPTANCE CORPORATION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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GENERAL MOTORS CORPORATION, a Delaware Corporation and GENERAL MOTORS ACCEPTANCE CORPORATION, a New York Corporation.

Respondents.

REPLY OF RESPONDENT GENERAL MOTORS ACCEPTANCE CORPORATION

Respondent General Motors Acceptance Corporation (hereinafter "GMAC") opposes the petition for a writ of certiorari and submits that the decision of the Court of Appeals does not present issues deserving of review by this Court.

I.

STATEMENT OF THE CASE

The petition presents only the question of the liability of respondent-appellant GMAC under the Dealer's Day in Court Act, 15 U.S.C. § 1221 *et seq.* The judgment be-

low in favor of defendant General Motors Corporation is not at issue.

Petitioner's claim has narrowed to a single event—GMAC's repossession of petitioner Olson's automobile inventory on October 22, 1969, pursuant to GMAC inventory security agreements. The Court of Appeals stated that GMAC repossessed by reason of Olson's "out-of-trust" condition. The facts are somewhat more complex, but, in general, it has been virtually conceded that prior to October 22, 1969, Olson Motor Company was insolvent, mismanaged, and had fallen into a dangerous pattern of selling GMAC licensed cars "out of trust", i.e., without remitting to GMAC the amount due out of the sale proceeds. GMAC justifiably deemed itself insecure and repossessed the inventory.

The only claim surviving on appeal was the Dealer's Act claim. At no time has petitioner challenged GMAC's acts under Article 9 of the Uniform Commercial Code, nor has petitioner ever suggested that GMAC did not act in accordance with the security agreements arising from GMAC loans that enabled Olson to acquire the inventory (floorplan financing).

To bring the case against GMAC within the scope of the Dealer's Act, petitioner argued (1) that GMAC acted as General Motors' agent[1] and (2) that the repossession constructively terminated Olson's franchise by harming the dealer's reputation and, ultimately, forcing him to sell the business.

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[1]The district court had ruled prior to trial that GMAC could be exposed to Dealers Act liability only if it were first proven that GMAC acted as General Motors' agent in repossessing the automobiles. GMAC and the other parties proceeded over two months of trial in reliance upon this pre-trial ruling. See Appendix C to petition.

By special verdict the jury found GMAC to have acted as General Motors' agent at the time of the repossession and to have acted in bad faith, causing damage to petitioner. However, the jury also found that petitioner had fully released General Motors from all liability. The district court thereupon entered judgment for GMAC (and General Motors), ruling as a matter of law that the release of the principal released the agent, GMAC.

The Court of Appeals expressly declined to review the jury's findings of bad faith, causation and damages which had been challenged by GMAC on its cross-appeal.[*] Those adverse findings had been previously challenged in the district court by GMAC's contingent post-trial motion. The district court likewise had declined to rule on GMAC's motion—being unnecessary in view of its conclusion that GMAC was released as a mattter of law. Therefore, the sufficiency of the evidence to support these jury findings remains an unresolved issue which, if necessary, should be remanded to the trial judge who is most familiar with the evidence. In GMAC's view, however, the release issue effectively disposes of the case, rendering any such remand unnecessary.

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[*]The facts relevant to these issues need not be discussed in detail here. Suffice it to say (1) that GMAC would have been grossly negligent under the circumstances if it had *not* taken direct action to protect its security, (2) that this dealer's failure was caused by a pre-existing destitute financial condition and a paralyzing management conflict, and (3) that the damages found by the jury were unsupported by admissable evidence.

II.

ARGUMENT

A. The Court of Appeals Determinaion On the Effect of the Release is Correct and Not Deserving of Review

Petitioner has never challenged the jury finding that General Motors was released from liability for all acts.[3] Rather, it challenges the applicability of well-settled law, as applied by the district court and the Court of Appeals, that the release of the principal releases the agent. *Cox v. City of Freeman*, 321 F.2d 887, 892-93 (8th Cir. 1963); *Transpac Construction Co. v. Clark and Groff Engineers, Inc.*, 466 F.2d 823, 829 (9th Cir. 1972). *See also Luxenberg v. Can-Tex Industries*, 257 N.W.2d 804 (Minn. 1977); *Hartigan v. Dixon*, 81 Minn. 284, 285-86, 83 N.W. 1091, 1092 (1900); 92 A.L.R.2d 533, 540-45 (1963).

This principle is especially applicable here. Petitioner's claim against GMAC was based on a single act—the repossession of October 22, 1969—which was committed by GMAC. Petitioner successfully contended that GMAC acted as General Motors' agent (thereby invoking the Dealer's Act). In other words, the case as presented by the petitioner in this Court must be viewed as if General Motors itself committed the culpable act. Since General Motors, as a corporation, cannot act at all except through some kind of agent, the case is indistinguishable from one in which General Motors' direct employees (also

[3]In the trial of the case, petitioner claimed only that the release was invalid by reason of economic duress. Petitioner has not challenged the jury's rejection of its duress claim.

agents) actually repossessed petitioner's inventory. The unqualified release of General Motors, under these circumstances, would make no sense unless it were held to have released its agents who actually performed the act charged.[4] There is no reason to re-examine the established principle of law applied by the Court of Appeals.

The joint-tort feasor release cases, headed by *Zenith Radio Corporation v. Hazeltine*, 401 U.S. 321 (1971) are not on point, as the Court of Appeals stated. This is a principal-agent case which does not involve any threat to the integrity or enforceability of federal law.

B. Dealer's Act Liability of GMAC

Petitioner also seeks review of the Court of Appeals' rulings on the applicability of the Dealer's act to GMAC. It is not clear from the petition, however, what practical value would be served by such review.

The Court of Appeals ruled preliminarily that GMAC was not subject to direct independent liability under the Act because GMAC was not a party to the franchise agreement.[5] The Court of Appeals expressly refused to consider the alternative grounds for GMAC's non-liability under the Act, i.e., that GMAC was not a "manufacturer" within the definition of 15 U.S.C. § 1221(a). By doing so, the Eighth Circuit intentionally avoided any apparent con-

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[4]GMAC vigorously denied it acted as General Motors' agent in any respect. The repossession was ordered based solely on GMAC's view of its interests as a finance company. Indeed, General Motor's personnel were not happy about the matter. For the purpose of discussing the release issue, however, GMAC acknowledges the finding of the Court of Appeals to the contrary.

[5]Relying on *Marquis v. Chrysler Corp.*, 577 F.2d 624 (9th Cir. 1978); *Stanisfer v. Chrysler Corp.*, 487 F.2d 59, 63-64 (9th Cir. 1973); *York Chrysler-Plymouth v. Chrysler Credit Corp.*, 447 F.2d 786, 791 (5th Cir. 1971).

flict with the Tenth Circuit decision in *Colonial Ford, Inc., v. Ford Motor Company*, 592 F.2d 1126 (10th Cir.); *cert. denied* 444 U.S. 837 (1979).[4]

The Court of Appeals ultimately ruled in petitioner's favor as to GMAC's Dealer's Act liability by affirming the jury's finding that, at the time of the repossession, GMAC acted as General Motors' agent, thereby exposing GMAC to Dealer's Act liability derivative from that of General Motors, under the authority of *Marquis v. Chrysler Corp.*, 577 F.2d 624 (9th Cir. 1978) and *Sherman v. British Leyland Motor Ltd.*, 601 F.2d 429 (9th Cir. 1973). This ruling required the Court of Appeals to proceed to the dispositive release issue which was then correctly resolved in favor of GMAC.

Petitioner claims that it was "burdensome" for it to prove GMAC's agency. The short answer is that the Court of Appeals found that petitioner had met that burden despite GMAC's vigorous assertions to the contrary.[5]

Ultimately, the petitioner prevailed on Dealer's Act liability but foundered on the release issue. In this posture, we suggest that this case does not present a suitable vehicle for an interpretation of the Dealer's Act by this Court.

Finally, it is noted that Congressional intent seems clear that finance companies were not to be included among the entities subject to direct liability under the Act. When the

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[4] *Colonial Ford* did not involve a release and is of doubtful applicability to this case. *Colonial Ford* is manifestly in error for a number of reasons, but discussion of that case is unnecessary in the present circumstances.

[5] The petitioner, both here and in the lower court, has virtually conceded that no evidence existed that General Motors was even aware of GMAC's act, much less directed that the repossession be performed. GMAC proceeded only because it was legitimately in jeopardy of suffering unrecoverable losses. Petitioner has never denied that GMAC was motivated solely by its views of its interests as a finance company.

Act was before Congress in 1956, Congressman Multer attempted to expand the definition of "manufacturer" as found in § 1221(a) by proposing the following definition:

> (a) "Manufacturer" means any individual, partnership, corporation, association, business trust, or any form of business enterprise, or any branch or agent thereof engaged in the business of manufacturing or assembling motor vehicles or of selling motor vehicles for resale, or servicing or *financing motor vehicles intended for resale.*

(Emphasis added.) Section 3(a) of H.R. 10310 (84th Cong. 2d Sess.) Congressional record Vol. 102, Part 9, p. 11672.* *See* Hearing Before a Sub Committee of the Committee on Interstate and Foreign Commerce, House of Representatives, 84th Cong. on H.R. 528, H.R. 2688 and H.R. 6544, and in general House Judiciary Committee report #2850, 84th Cong. June 4, 1956.

The Multer definition would clearly have made GMAC and other finance companies subject to direct and independent liability under the Dealer's Act. Yet, the Multer bill did not survive Congress and Multer's expanded definition of "manufacturer" was not incorporated into the Act. Congressional intention seems clear: the duties created in the Act were confined to actual manufacturers or those actually granting dealers' franchises.

An automobile dealer, like any retailer, must have a number of collateral services to remain in business—financing, utility services, fuel deliveries, among others. No one has ever suggested, however, that the Dealer's Act was intended to provide any remedy for their discontinuance

*Reproduced in part in the appendix hereto.

or to supplant existing commercial law applicable to such services. In the case of secured financing services, Article 9 of the Uniform Commercial Code has been quite adequate to regulate enforcement of security agreements by finance companies.* The reach of the Dealer's Act was limited only to the actual franchise relationship itself which would otherwise have had no such protection.

C. The Court of Appeal's Decision Does Not Threaten Evasion of the Dealer's Act

The integrity of the Dealer's Act is unaffected by the Court of Appeals' decision. The proof requirements remain routine.

A plaintiff's ability to prove an agency relationship is easily demonstrated by this very case, and the requirement that such proof be presented before a finance company can be subject to Dealer's Act liability is no more burdensome than any other proof requirement.

Nor does the holding as to the release threaten evasion of the Act. The Court of Appeals' decision means only that the unqualified release of a principal, when a single culpable act is charged, also releases the agent committing the act absent evidence to the contrary. If such evidence exists, the ordinary law of contracts provides ample opportunity to limit the apparent scope of a release. In this case, the petitioner offered no such proof.

This case does not present an issue involving the integrity or enforceability of the Dealer's Act. This case rather involves a plaintiff which has voluntarily executed

*We note again that petitioner never challenged GMAC's acts as a violation of the U.C.C. or any other law pertaining to enforcement of security agreements.

a full release for valuable consideration[18] and has later been persuaded to try for more. In this posture, the case presents no issue deserving review by this Court.

III.

CONCLUSION

The respondent GMAC submits that the petition for a writ of certiorari should be denied.

Datted: September 9, 1983.

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[18]Petitioner has never challenged the consideration supporting the release which was substantial both in dollars and other respects.

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APPENDIX

"H. R. 10310

UNITED STATES
OF AMERICA

Congressional Record

PROCEEDINGS AND DEBATES OF THE

84TH CONGRESS
SECOND SESSION
VOLUME 102 — PART 9

JULY 2, 1956, TO JULY 16, 1956
(Pages 11515 to 12980)

UNITED STATES GOVERNMENT
PRINTING OFFICE, WASHINGTON, 1956

"A bill to provide for the regulation of motor vehicles on the highways of the United States, and for other purposes.

"*Be it enacted, etc.*, That this act may be cited as the 'General Motor Vehicles Act of 1956'.

"DECLARATION OF POLICY

"Sec. 2. It is hereby declared to be the policy of Congress through the exercise in this act of its power to regulate commerce, in accordance with which policy all of the provisions of this act shall be interpreted, to promote safety in the operation of motor vehicles by the general public on the highways of the United States, and to regulate the trade practices between manufacturers of motor vehicles and their franchised dealers and the general public.

"DEFINITIONS

"Sec. 3. As used in this chapter —

"(a) 'Manufacturer' means any individual, partnership, corporation, association, business trust, or any other form of business enterprise, or any branch or agent thereof engaged in the business of manufacturing or assembling motor vehicles or of selling motor vehicles for resale, or servicing or financing motor vehicles intended for resale.

"(b) 'Dealer' means any individual, partnership, corporation, association, or any other form of business enterprise, or any branch or agent thereof, engaged in the business of

purchasing motor vehicles for resale and of exchanging or servicing motor vehicles.

"(c) 'Motor vehicle' means any motor driven or propelled vehicle, except airplanes, road rollers, traction engines, power shovels, and other equipment used in construction work and *not* designed for or employed in general highway transportation, as well as farm and agricultural machinery, and vehicles designed for running on tracks or rails.

"(d) 'New motor vehicle' means a motor vehicle which has never been the subject of a sale with intent to pass an interest therein and has never been driven, pushed, towed, or propelled over a public highway.

"(e) 'Used motor vehicle' means a motor vehicle which has been sold, bargained, or exchanged, given away, or whose title has been transferred from the person who first acquired it from the manufacturer or dealer, and so used as to have become what is commonly known as second-hand, within the ordinary meaning thereof, or which has been driven, pushed, towed, or propelled over a public highway.

"(f) 'Franchise' means the right, privilege, or authorization accorded the dealer by the manufacturer, whether by contract, agreement, or otherwise, to purchase, sell, and service motor vehicles.

"(g) 'Commerce' means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation.